No. 18674

IN THE

# United States Court of Appeals

FOR THE NINTH CIRCUIT

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ALBERT H. NEWTON and GENEVIEVE NEWTON,
*Appellants,*

*vs.*

NEW YORK LIFE INSURANCE COMPANY, *et al.*,
*Appellees.*

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## REPLY BRIEF FOR APPELLANTS NEWTON.

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## REPLY BRIEF FOR APPELLANTS NEWTON.

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### I.

### Appellees' Brief Asks This Court to Depart From the Ordinary Meaning of "Incontestable" in Interpreting the Insurance Contracts.

Appellees contend that when they employ the technical word "incontestable", it means that the incontestable clause may be used in *favor* of the insurance company and *against* the insured (Appellees Br. p. 14 *et seq.*).

It is submitted that Appellees are asking this Court to depart from the ordinary meaning of "incontestable" in interpreting the contracts at issue.

> "(a) The *ordinary meaning* of language throughout the country is given to words unless circumstances show that a different meaning is applicable."
>
> "(b) Technical terms and words of art are given their technical meaning unless the context or a

usage which is applicable indicates a different meaning."

Restatement "Contracts" 235. See also Calif. Civil Code 1645; 4 Williston "Contracts", 3rd Ed., 707, 590.

The word "incontestable" as used in insurance contracts is defined at page 1145 of Webster's Third New International Dictionary (1961) as "being such that payment of claims cannot be disputed *by a life insurance company* for any cause except nonpayment of premiums or other reason specifically stated in the contract when the contract has been in force for a stipulated period (as one or two years) and when an insurable interest existed at its inception." (Emphasis supplied.)

An almost identical definition of "incontestable" was given at page 1259 of Webster's Second New International Dictionary (1934).

It is significant that not one of the many court decisions cited in Appellees' brief refers to a situation where an insurance carrier successfully used the incontestable clause against one of its insureds.

## II.

## There Should Be No Difference in Interpretation When the Word "Incontestable" Is Used in an Annuity Contract.

Appellees contend that "incontestable" is meaningless in an annuity contract unless they can use it against their insureds. (Appellees Br. p. 20 *et seq.*) To this we reply:

1. If the annuity seller chooses to employ a technical word like "incontestable" in drawing a contract,

it is obliged to specify that the word was not being used in its ordinary meaning but rather in a different sense, the definition of which should be spelled out in its contract.

2. The word in its ordinary meaning is not necessarily meaningless in an annuity contract. It may be farfetched, but it is still conceivable that an annuity company might want to avoid continued payment of annuity claims to an annuitant possessed of an extraordinary longevity. Perhaps it would discover that annuitant's application had fraudulently concealed both his own good health and the persistent longevity of his ancestors. The incontestable clause, in its ordinary meaning, would then protect such an annuitant. An advance in the science of geriatrics may make it hazardous to have underwritten certain annuities and some carriers might well start thinking fondly of the fraud defenses that were used before the "incontestable clause" came into existence.

## Conclusion.

The judgment below should be reversed and the District Court directed to try the case upon the merits.

Respectfully submitted,

KENNY, MORRIS & IBANEZ,
HURLEY & BIGLER,
By ROBERT W. KENNY,
*Attorneys for the Appellants Newton.*

## Certificate.

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit and that, in my opinion, the foregoing brief is in full compliance with those rules.

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